

The strategic role of courts in advancing climate policy

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by

Climate lawsuits have recently become a [global phenomenon](#). As such, they have been increasingly successful in drawing media attention. However, the narrative about their novel and combative character often eludes an inconvenient truth: they are hardly won. The question then is, how relevant is it for a climate lawsuit to win?

Climate change: just a political matter?

Until twenty years ago, the idea to bring a government to Court for its lack of ambition on climate policy would have sounded odd to many. Climate change was considered a rather political and technical matter, to be left to each government's discretion.

Climate lawsuits, on the contrary, assume that global warming represents a matter for legal concern, as it creates obligations for those who contribute to it, and rights for its victims. With this in mind, starting from the early 2000s, many environmental organizations have been suing governments and companies for their *failure to properly respond and adapt to climate change*.

The strategic aims of climate litigation

However, the aims of climate lawsuits are also political in a broad sense. As with other examples of [strategic litigation](#), they aim to use an evolutive interpretation of the law as a tool to influence States' and corporate behavior. Their political ends and

strategic ways make climate lawsuits inherently different from a lawsuit between two private citizens. When social movements get to court, their aim is not to change an individual situation or end a particular abuse, but rather to influence a government's general attitude towards climate policy.

The winner doesn't take it all

Nevertheless, to achieve that objective, climate lawsuits don't need to be won. Naturally, a favorable judicial decision still is the most desirable outcome, as it can affect directly, and with a legal effect, a political line of action. However, court decisions can influence States' behaviors on climate change in more subtle and [indirect](#) ways.

Firstly, even when they leave a margin of discretion, climate lawsuits can provide governments with an authoritative basis to undertake ambitious climate policies, despite their unpopularity and against the conflicting interests of powerful lobbies. For instance, in 2014, the Obama administration, faced with a republican majority in the House, could justify the introduction of a federal mitigation plan on the basis of the US Supreme Court's decision in *Massachusetts v. EPA*.

Secondly, when they are not successful – which is, in the large majority of cases – climate lawsuits offer a forum where the most controversial legal theories and imaginative strategies can be tested and discussed.

As a matter of fact, due to their novelty, climate cases often challenge national courts with difficult legal questions. Just to mention a few, in 2015 the Oslo district court was asked to pronounce on the extraterritoriality of Norway's human rights obligations. In practice, the question was whether the government, in the exercise of power over its marine territory, i.e. when authorizing a project of oil excavation, should have taken into account the consequences of its own actions on the human rights of people living in other countries. In the same year, a Peruvian farmer sued Germany's largest electricity company ("RWE"), based on its contribution to climate change. According to the claim, human emissions were responsible for the melting of the glaciers near the farmer's village of origin, and for the consequential flooding of the lake located above it. Pondering the application of different possible theories of causation, the plaintiffs asked RWE for the compensation of the costs in which the village would have incurred to protect from flooding. Similarly, on the day of the last Global Climate Strike, Greta Thunberg and other young activists claimed for the first time in Court, that climate change is a children human rights issue and a matter of intergenerational equity.

All the cases mentioned are groundbreaking, as they pursue the application of legal principles and sources that are still controversial or unsettled. On the other hand, the legal uncertainty around them often makes courts reluctant to endorse courageous interpretations of the law. Nevertheless, as those cases increase and grow into a movement, judges have the chance to compare to one another and eventually import "foreign" theories in their own jurisdictions. In this way, the hoped social and political change can happen indirectly, as a result of a dialogue between courts.

Making the case for a public debate on climate

Finally, even when their claims are rejected by courts, climate lawsuits can indirectly boost change, by leading the public conversation towards important aspects of the climate crisis. As a matter of fact, the media attention towards climate lawsuits seems to have increased, also due to the [“rights-turn”](#) taken by the climate judicial movement.

Lawyers around the world have started defending that governments, giving their inadequate climate policies, are accountable for the violation of the rights to life and human dignity of their citizens. Such shift is not only in the legal but also in the communicative strategy of climate lawsuits, as their main grounds are no longer just abstract legal thresholds, but rather coincide with the lives and dignity of real people.

Rights-based lawsuits confront Industrialized States, including us as citizens, with some of the most urgent moral questions for our generation. They could all be summed up as follows: *Are we violating the rights of our children and of those living in the Global South by continuing to support the fossil fuel industry?* The hope is that, as the awareness of such [moral dilemmas](#) grows, and courts accept their role in opening up the public conversation on climate change, the political representatives will feel compelled to remedy their inaction, or else, to answer those questions.

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